APPENDIX A

OPINION

Francis M. Shea and Richard T. Conway, both of Washington, D. C., for the plaintiffs in Action No. 777-66; and for the defendants in Action No. 784-66.

Joseph L. Rauh, Jr. and Isaac N. Groner, both of Washington, D. C., for the defendant in Action No. 777-66; and for the plaintiff in Action No. 784-66.

This is the trial of two consolidated actions, one brought by a group of railroads against the Brotherhood of Locomotive Firemen and Enginemen, and the other instituted by the Brotherhood against a number of railroads. The second action had been filed originally in the United States District Court for the Northern District of Illinois, and on defendants' motion was transferred here by Chief Judge Campbell of the Illinois Federal Court. The two were then consolidated on motion of the plaintiffs in Action No. 777-66. In each action a declaratory judgment and a permanent injunction are sought and a counterclaim is interposed for reciprocal relief.

The basic issues to be determined are the effect and the consequences of the termination of the effective period of an Award of a compulsory arbitration proceeding concerning two principal issues of a nationwide controversy between Class I railroads and organizations of railway employees. The differences in dispute were the need for continued use of firemen on Diesel engines in freight and yard service, and the possibility of reduction in the size of train crews on numerous runs throughout the country. The compulsory arbitration was directed by a Joint Resolution of Congress, approved August 28, 1963, 77 Stat. 132, in order to prevent a threatened nationwide railroad strike.

It was claimed by the carriers that firemen were not needed on Diesel engines in freight and yard service, as there were no longer any fires to stoke and that whatever other help was rendered by the fireman was in fact accorded

by the head brakeman, whose post was also in the cab of the engine.[1]

The Arbitration Board, known as Board 282, reached the conclusion that firemen were no longer needed on Diesel engines in freight and yard service, except as to ten percent of the number, who it was held should be retained for unusual and extraordinary situations. In order to prevent hardship and distress to thousands of employees, however, the Award of the Board did not direct that ninety percent of the firemen in question could be discharged forthwith, but provided that the result should be accomplished only by attrition over the years, which would ease any possible financial distress to the individuals concerned and to their families. Accordingly, it was prescribed by the Award that all firemen who had at least ten years of service, should retain their status until death, retirement, resignation, or discharge for cause. The same right was extended to firemen having between two and ten years of service, with the qualification, however, that the carriers were to have the privilege of offering comparable positions to firemen in this class, for which they were qualified or could be made qualified, with a guarantee of employment in the new positions for at least five years. Any moving expenses incurred by the employees under these circumstances were to be borne by the employer. If such an offer were declined by the employee, he could be discharged upon the payment of severance pay, the size of which was dependent upon the length of his service. The employment of firemen of less than two years' service could be terminated upon the payment of severance allowances, again measured by the length of service.

In respect to the proposed reduction of sizes of crews on numerous trains, the Award formulated certain specific considerations called "guidelines," to govern the decision as to whether the size of any specific crew should be reduced.

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[1] No question was raised as to the necessity of firemen in passenger service because the railroads did not dispute the need of having two men in the cab, and in passenger service it was not customary for a brakeman to be stationed in the cab.

The issues as to particular crews were remanded to the local properties for negotiations. If negotiations did not result in an agreement, special boards of adjustment were to be created in the respective localities in order to resolve the disputes.[2]

The consolidated actions now before the Court were tried on the basis of a stipulation of facts, which the Court adopts as its findings of fact. This opinion will constitute the conclusions of law. The issues in these actions involve the provisions of the Award which relate to firemen. Similar questions affecting trainmen were determined in *Akron & Barberton Belt Railroad Co. et al.* v. *Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691.

The Joint Resolution of August 28, 1963 provided that the Award of the Arbitration Board was not to become effective until sixty days after it was filed. The statute further directed that the Award was to continue in force for such period as the Board should determine, but not to exceed two years from its effective date. The Board ordered in the Award that it should continue for two years from its effective date, unless the parties agreed otherwise. The expiration date of the Award was originally January 25, 1966. It was extended by agreement to March 31, 1966 as to the Brotherhood of Locomotive Firemen and Enginemen.

While the Award was in effect the railroads gradually reduced the number of firemen in their employ by about 18,000, and paid separation allowances approximating about $36,000,000 to firemen whose employment was severed. About 1200 employees accepted offers of other positions under the provisions of the Award.

As heretofore indicated the questions to be determined at this time are the rights and liabilities of the parties in respect to firemen as to rates of pay, rules, and working conditions after the expiration of the effective period of the Award. It is claimed by the union, as was also contended

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[2] The history of the controversy and the details of the arbitration and the Award were summarized in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, Burlington & Quincy Ry. Co.*, 225 F. Supp. 11; and in *Akron & Barberton Belt Railroad Co. et al.* v. *Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691.

by the Brotherhood of Railroad Trainmen in the *Akron & Barberton* case, *supra*, that upon the termination of the effective period of the Award, the *status quo* that existed prior to the Award was automatically restored. The Court rejected this contention in the *Akron & Barberton* case, and here repeats that rejection.[3] The Award and the operations under it created a new status in regard to rules and working conditions. This status may not be changed, as we explained in detail in the opinion of this Court in the *Akron* case, except by agreement or by serving notices under Section 6 of the Railway Labor Act (45 U.S.C. § 151) and exhausting, step by step, each of the remedies accorded by that statute.[4] Neither side may make changes unilaterally until the remedies under the Railway Labor Act are exhausted. No recourse may be had to self-help until that stage is reached, which means that so far as the firemen are concerned, they may not resort to a strike, and any such strike would be illegal.

Every statute must receive a reasonable and sensible construction. Any interpretation that obviously fails to effectuate the purpose and intent of the legislative body should be rejected. This doctrine applies not only to the Joint Resolution of Congress, but also to the Award of the arbitration board. The Award manifestly contemplated the eventual permanent abolition of the jobs of firemen on Diesel engines in freight and yard service, except as to ten percent of that number, but proposed that the desired result should be reached gradually by a process of attrition. It was not intended, therefore, that the steps taken during the effective period of the Award should become a nullity at the end of the two-year period. The purpose of the Congress and the effect of the Award would be entirely frustrated if the railroads were required to rehire firemen whose positions have been abolished during that interval. So, too, the

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[3] The reasons for this conclusions are summarized in detail in the *Akron* case, 250 F. Supp. 691, and need not be repeated here.

[4] The machinery provided by the Railway Labor Act for the settlement of labor disputes is also described in detail in the opinion in the *Akron* case, *supra*.

vested rights of those firemen who were accorded permanent protection by the Award, are not to be wiped out.

It is argued by counsel for the Brotherhood that since the Award is at an end, whenever any firemen dies, retires, or resigns thereafter his position should be filled by a new appointment. Such a course too would completely defeat the purpose and the meaning of the Award, for the objective of the Award was to abrogate the use of unnecessary firemen, but to accomplish this result by degrees and as far as possible in a painless manner.

On the other hand, neither side may take any further affirmative steps under the Award after its termination date. Thus, the railroads may not discharge any more firemen pursuant to the provisions of the Award. What has been accomplished under the Award remains and is not to be nullified or wiped out. The firemen with seniority of more than ten years retain a permanent status for their working life, which was granted to them by the Award. The firemen who accepted comparable jobs with a guarantee of five years' employment, retain that guaranty. On the other hand, the carriers are under no obligation to fill vacancies that had been caused by the separation of firemen from their positions, or to fill future vacancies. Those positions are permanently abolished. As heretofore stated, a new status has been created and no change may be made in that status except by agreement or by the service of notices under Section 6 of the Railway Labor Act, and recourse to the provisions of that statute.

A number of States have what are known as "full crew" laws, that require railroads operating within their borders to maintain crews of a certain specified minimum number. The Supreme Court has recently held in *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423, that Award 282 did not supersede these "full crew" laws. The result is that in some States, the railroads have not been able to achieve reductions in the number of firemen that they would have been permitted to make under the Award, if the "full crew" laws had not interfered. One of those States is Oregon, which has recently

repealed its full crew law effective January 1, 1967. It is argued by counsel for the carriers that after January 1, 1967, the railroads should be permitted to take advantage of the provisions of the Award to the extent of offering comparable jobs to firemen who had between two and ten years' standing, and discharging firemen of less than two years' standing. This Court disagrees. Since the effective period of the Award has expired, no affirmative steps may be taken under it. The mere fact that State statutes, as construed by the Supreme Court, have prevented the railroads in some instances from taking full advantage of the provisions of the Award, does not have the effect of prolonging or restoring their rights when the bar of the State statute is eliminated. The situation must be deemed frozen as of the close of the effective period of the Award. This is entirely different from the converse ruling that no vacancies occurring by attrition after the termination date need be filled. In other words, there is no right or duty to take any affirmative step under the Award on the part of either side after the crucial date.

As has been indicated and as this Court held in the *Akron* case, a new status was created by the Award and the activities under it. This status prevailed as of the date of the termination of the effective period of the Award. The sole and exclusive method of modifying it is either by agreement or by serving appropriate notices under Section 6 of the Railway Labor Act and going through the various steps by way of negotiations, mediation, and the other proceedings provided by the statute. In this instance, three such notices were served by the union during the effective period of the Award. As this Court held in the *Akron* case, while notices might be served during that interval, they did not become effective until the day after the termination of the effective period of the Award. In other words, neither side was under any obligation to participate in any of the proceedings accorded by the Railway Labor Act, pursuant to such notices until after March 31, 1966.

Naturally, there are certain limitations on the types of notices that may be served under Section 6 of the Act.

They must relate to issues concerning which the party that initiates them has a right to insist on negotiating. In other words, to use the terminology of the Labor law, they must involve "bargainable issues", *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 739-740. Second, so far as Award 282 is concerned, the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved. Collective bargaining must be restricted to the future and may not relate to alleged past grievances, *Elgin, J. & E. R. Co.* v. *Burley, supra.*

This discussion brings us to a consideration of the three notices served by the Brotherhood, which are involved in these actions. By stipulation the effect and validity of Notice No. 3 were withdrawn from disposition at this trial and were reserved for later consideration. The Court will, therefore, limit its decision in this respect to the first two notices. Notice No. 1, dated November 15, 1965, proposes that firemen taken from the seniority ranks of firemen shall be used on all locomotives on road and yard service, with a few enumerated exceptions. It provides further that a "job" may be operated without a fireman only when it becomes necessary to hire a fireman. Further it proposes that the carriers should hire and place on the firemen's seniority roster a sufficient number of firemen to comply with the provisions of the notice. In other words, this notice demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration.

Notice No. 2, served at the same time, goes even further. It proposes that all employees whose employment and seniority were terminated under the Award of Arbitration Board 282 should be recalled and restored to their seniority roster and employed with their original seniority date and used as firemen. It further proposes that individuals so restored should be reimbursed for any monetary losses sustained by them as a result of the termination of their employment and for expenses that they may have incurred by way of travel, lodging and meals, etc., or as a result of sale of homes. This Notice uses the terms "application or misapplication" of the Award, and denominates the termination of employment under the Award as being "improper". Manifestly, the use of such phraseology is not to be commended. The Board that rendered the Award was created under the law of the land and its Award has eventuated in a judgment of the Court. Irrespective of the inappropriateness of the phraseology, the purpose of the Notice is not only to set aside the Award and to restore firemen whose employment has been lawfully terminated, but in addition to provide for the payment of damages or losses alleged to have been sustained by them. Manifestly, this is not permissible. The validity of the Award and of any steps taken under it during its effective period, are obviously not "bargainable issues".

It follows hence that Notices 1 and 2 are not valid under Section 6 of the Railway Labor Act and that, consequently, there is no obligation on the part of the carriers to enter into negotiations concerning the subject matter of these Notices. The union may not resort to unilateral action or have recourse to self-help in order to bring about the results sought by the Notices. In other words, any strike for that purpose would be illegal as in violation of the Railway Labor Act and subject to injunction.

At the trial counsel for the union moved to dismiss the complaint as to three of the carriers and also as to the railroads constituting the Southern Railway System, on the ground that Award 282 was inapplicable to them. For reasons stated at the trial and also discussed in the opinion

of this Court in the *Akron* case, *supra,* the motion was denied.

The union also reiterated its position that the Norris-LaGuardia Act was applicable to any attempt to enjoin any strike of railroad employees. For reasons fully stated by this Court in its opinion in the *Akron* case, which it would be surplusage to repeat, the Court holds that the Norris-LaGuardia Act is not applicable to an action or motion for such an injunction or a temporary restraining order.

In conclusion this Court may summarize its rulings as follows:

1. The termination of the two-year effective period of the Award of Arbitration Board 282 did not restore the rates of pay, rules, and working conditions existing prior to the enactment of the Joint Resolution of Congress of August 28, 1963. On the contrary, the provisions of the Award and actions taken under it during its effective period created a new set of rules and working conditions as of the date of its termination. Any attempt to change the new status may be pursued only by serving appropriate notices under Section 6 of the Railway Labor Act and invoking the course of action in the various stages prescribed by that statute.

2. Rights that have become vested as a result of the operation of the Award remain vested, and are not nullified. Thus, firemen having more than ten years' seniority retain the permanent status accorded to them by the Award until death, retirement or resignation. Firemen having a seniority of two to ten years, who have accepted comparable jobs with a five year guarantee of employment retain that guaranty. Firemen whose employment has been severed and who have received severance allowances, retain the money that has been paid to them. The positions that have been abolished as a result of the operations of the Award are permanently abolished.

4. Whenever any fireman who has a vested seniority under the Award dies, retires, or resigns, the position that he had filled is automatically abolished and consequently no one need be designated to fill it.

5. As no further steps may be taken under the Award after the termination of its effective period, the carriers may not dispense with any more firemen pursuant to the terms of the Award, or offer comparable jobs to any of them. The fact that in some instances the carriers have been prevented by State "full crew" laws from severing the employment of some firemen in accordance with the Award, does not authorize the carriers to dispense with them or offer them comparable jobs after the repeal of any "full crew" law.

6. Notices that were served under Section 6 of the Railway Labor Act, during the effective period of the Award, although premature, are nevertheless to be regarded as having been legally served and need not be served again. They did not become effective, however, until the day after the termination of the effective period of the Award and there was no obligation on the part of either side to proceed to conferences, negotiations, or mediations required by the Act until after that date.

7. Notices 1 and 2 served by the Brotherhood of Locomotive Firemen and Enginemen purportedly under Section 6 of the Railway Labor Act are invalid in that they do not relate to matters subject to collective bargaining under the statute, but are attempts to abrogate the provisions of the Award of Arbitration Board 282, and in effect to restore the situation as it existed on August 28, 1963 with a reimbursement for losses alleged to have been sustained by firemen who have been discharged. These notices being illegal and ineffective, need not be complied with.

8. The Norris-LaGuardia Act does not apply to any action or motion for a preliminary or permanent injunction, or restraining order against a strike in violation of the provisions of the Railway Labor Act.

9. Any strike of railroad employees called before the exhaustion of all remedies provided by the Railway Labor Act would be illegal.

10. The prayer for a permanent injunction against a strike is hereby granted.

Counsel may submit an appropriate judgment in accordance with the foregoing rulings.[5]

ALEXANDER HOLTZOFF,
United States District Judge.

May 9, 1966.

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[5] Counsel for the Brotherhood of Locomotive Firemen and Engenemen, shortly prior to the trial of this action, filed a motion that the Judge disqualify himself, and this motion was accompanied by a so-called "affidavit of bias and prejudice". The Court denied the motion and overruled the affidavit. This action was based on two grounds: first, the affidavit was not timely filed in that it was submitted after a number of motions were heard and disposed of in this action; second, the affidavit contained no showing that the Judge had any personal bias or prejudice against the Brotherhood, but merely that the Judge had made certain rulings that were adverse to the Brotherhood. The fact that adverse rulings are made by a Judge is not a ground for an affidavit of bias and prejudice. It may be noted in passing that the affidavit ascribes to the Judge a statement that the Court would not *sua sponte* take steps to enforce the collection of the fine theretofore imposed, but this could be done only on the motion of the carriers or of the Government. This statement was in fact made by the Judge from the bench in open court in view of the fact that the fine was imposed for civil and not criminal contempt. It was made during a hearing on some of the many motions in this litigation. Obviously, this statement does not establish personal bias or prejudice, but quite the contrary. The authorities on these points were thoroughly reviewed by Judge Sirica of this Court in *United States* v. *Hanrahan*, 248 F. Supp. 471, and by Judge Wilson of the Eastern District of Tennessee, in *United States* v. *Hoffa*, 245 F. Supp. 772. This Court refers to and agrees with the discussion of the law on this subject in those two cases, and it would be surplusage to repeat it here.

APPENDIX B

Appeals from the United States District Court
for the District of Columbia

Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge*: * This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in

* As amended by Order of July 18, 1967.

effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargaining agreements, court decisions and administrative orders. The system covers among other things the manning of trains and

[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of firemen-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology and innovations

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[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n. 5 (1966).

would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] proposing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to

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[6] Brotherhood of Locomotive Engineers v. Baltimore & O. R.R., 372 U.S. 284, 290-91 (1963).

[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute*, H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That resolution made it clear that these were to be only interim work rules to be effective until the parties themselves agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change" [9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect,

[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

unless the parties agree otherwise." [10] It is this provision specifying the maximum mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was "highly favorable to the employees," *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years,

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[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separation benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App.D.C. 100, 331 F.2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here

[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period

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[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S. App. D.C. 230, 349 F. 2d 207 (1965); Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F. 2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F. 2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F. Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac. R.R., 230 F. Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F. Supp. 259 (D.D.C. 1964).

of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bargaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Brotherhood of Railroad Trainmen (BRT), and Switchmen's Union of North American (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F.Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F.Supp. 691, 252 F.Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F.Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even

[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F. Supp. 476 D.D.C. 1966).

though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] *See Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen*, 250 F.Supp. 691, 695-97 (D.D.C. 1966).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statute was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our aproach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the

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[15] *Compare* Manning v. American Airlines, Inc., 329 F. 2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F. Supp. 301 (S.D.N.Y. 1963).

[16] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, ——, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification —subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination." [17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at

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[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F. 2d at 34.

the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during

[18] *See* Note 10 *supra*.

the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems."[22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and un-

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

equivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4,

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[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S. App. D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ."[27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the

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[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 326 (E.D. Tex. 1963).

way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract."[28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history

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[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." [30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargain-

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

ing whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.*, Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963).

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its life time could be broached to the carriers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bar-

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[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F. Supp. 538 (D.D.C. 1966).

[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

gaining "in good faith." [34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

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[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n, *supra*, 169 F. Supp. at 793-95.

[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

The carriers' denial of an obligation to bargain with the BRT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F. Supp. 691, 252 F. Supp. 207, and 254 F. Supp. 306 (D.D.C. 1966).

The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or otherwise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of colleetive bargaining. Several abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the car-

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F. Supp. 682 (D.D.C. 1966).

riers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 687.

Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't*, 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay, rules, or working conditions."[41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."[42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world."[43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry.*, *supra* note 31, 362 U. S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees them-

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[40] *Accord*, Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F. 2d 183, 191 (5th Cir. 1965).

> selves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the

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[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

[45] *See* H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49 (1962).

Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration." [47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 8, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation suggestions or

[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 688.

fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be " 'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .' " *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was nonbargainable. The carriers argue now that the District Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts

by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers). . . ." In subsequent sections, the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

[48] I note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 2? We turn to *Elgin, J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation.

The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act[50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules,

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F. 2d at 334-35.

[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, —— U.S.App.D.C. ——, —— F. 2d —— (No. 20135), decided this day.

classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award—and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

* * * * *

It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of agreement and, if possible, harmony between carriers and unions.[53]

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[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectiyely over the settlement of past grievances that is imposed by Section 6.

[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit, sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broad-

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

Affirmed in part,
reversed in part.

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ening of application of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the workload, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

Appendix

Public Law 88-108

Act of August 28, 1963, 77 Stat. 132.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress find that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of

his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution

or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX C

Appeals from the United States District Court for the District of Columbia

Supplemental Opinion Filed July 31, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

SUPPLEMENTAL OPINION

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing In Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board 282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for

making changes by award, and were intended to have only a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until

changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the contention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the

Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added). In explaining why the Award provided that the union could insist on saving ten per cent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions

only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not con-

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

sider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

This construction also gives what we consider the appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectiveness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation. The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be regarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last

day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R. R.*, 382 U.S. 423 (1966). The opening sections of the

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that

[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D. Wis. 1960).

in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties preempts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 AM. JUR. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor

Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of

the carrier and employees." (*See* Section 7(a) of Public Law 88-108.) The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

* * * * *

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6] The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

APPENDIX D

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge.

JUDGMENT

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is.

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforesaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

APPENDIX E

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge, in Chambers.

MEMORANDUM AND ORDER

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co. et al, in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board, even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of

respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 681. The Board's energy was not limited to "the dispute which was before it [Congress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period."

So ordered.

APPENDIX F

AWARD

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution, the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company,

and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to prejudice the position of any carrier or any organization as to these jurisdictional questions.

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideraiton to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. Disposition of Section 6 Notices

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

II. Use of Firemen (Helpers) on Other Than Steam Power

Part A—Saving Clause

A(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

Part B—Reductions in Jobs

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continued to use firemen (helpers); provided, that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so desig-

nated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded $200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's pay-

rolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in

that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

Part D—Rights to Work

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler

helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or

temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B(2) and B(3) of this Award.

PART E—CONTINUING STUDY

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. CONSIST OF ROAD AND YARD CREWS (OTHER THAN ENGINE SERVICE)

PART A—BASIC PROVISIONS

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated num-

ber of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

PART B—REVIEW PROCDURES

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application

of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after the receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the appointment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

PART C—GUIDELINES

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considera-

tions, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.
(b) Avoidance of unreasonable burden or workload on members of the crew.
(c) Changes in operating conditions, including density of traffic.
(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.
(e) Special conditions which exist on any particular assignment.
(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.
(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).
(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.
(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.
(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).
(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.
(b) The number of passenger cars handled in the train and passenger count.
(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.
(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.
(b) The length of train, in context with the amount and nature of work to be performed en route.
(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.
(b) Volume of work considered in context with applicable service time limitations.

PART D—EMPLOYEE PROTECTION

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any

right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

IV. Duration

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

/s/ Benjamin Aaron,
Neutral Member.

/s/ James J. Healy,
Neutral Member.

/s/ Ralph T. Seward,
Chairman of the Arbitration Board.

Concurring:

/s/ Guy W. Knight,
Carrier Member.

/s/ J. E. Wolfe,
Carrier Member.

Dissenting:

H. E. Gilbert,
Organization Member.

R. H. McDonald,
Organization Member.

APPENDIX G

Rulings By Arbitration Board No. 282

Carriers' Question #2

Section II—Part B(3) Answered May 17, 1964

Q. No. 2—It is the carriers' understanding that new regular assignments may be operated without a fireman unless or until included in the local chairmen's subsequent veto pursuant to Part B(3) of Section II. Is the carriers' understanding correct?

Answer—This understanding is correct.

B.L.F. & E. Question #6 Answered May 17, 1964

Q. No. 6—(a) May the carrier abolish an assignment which has been vetoed by a local chairman in a subsequent ninety (90) day interim period between listings and therefore lower the percentage of vetoed positions below ten (10) per cent?

(b) May the carrier consider as blankable, those assignments which may be established in a ninety (90) day interim period between listings, and therefore lower the percentage of vetoed positions below ten (10) per cent?

Answer—(a) In an interim period between listings, the carrier may abolish an assignment which has been vetoed by a local chairman. If this is done however, the local chairman may immediately veto an alternate assignment for each vetoed assignment so abolished.

(b) New regular assignments, established during an interim period between listings, may be operated without a fireman unless or until included in the local chairman's subsequent veto.

B.L.F. & E. Question #9 Answered May 17, 1964

Q. No. 9—May the carrier consider as a blankable job and refuse employment of a helper-fireman on extra assignments in road freight and yard service, including service

on light engine movements, messenger service and on self-propelled machines where presently required?

Answer—The carrier may not refuse employment of a fireman (helper) in extra road freight and extra yard service including extra light engine movements, messenger service and self-propelled machines (if any self-propelled machines are operated on which firemen (helper) are presently required) if there are employees who are available for service where rights to continued employment as firemen (helpers) are protected under Section II, Parts C and D of this Award. If no such employees are available, however, a new employee need not be hired.

B.L.F. & E. Question #79 Answered September 16, 1964

B.L.F. & E. Question #79—May the carrier hold a C-6 or C-7 helper-fireman on the extra board to fill a vacancy on a non-blankable assignment and, in turn, operate an extra assignment without a helper-fireman?

Answer—The carrier may hold a C-6 or C-7 fireman (helper) on the extra board to fill a vacancy on a non-blankable assignment, and, in turn, operate an extra assignment without a fireman (helper), unless such action would cause the fireman (helper) to lose a day or more of work.

B.L.F.&E. Question # 82 Answered October 23, 1964

B.L.F. & E. Question #82—Is it the intent of the Award and its subsequent interpretations to allow a carrier to arbitrarily ignore the criteria of safety, efficiency and burden of work in creating "blanked" assignments and instead apply the criteria of earnings and cost of employing a helper-fireman as the principle factor of determination?

Answer—Section II, Part B, Paragraph B(1), contemplates that in determining which crews do not require the services of a fireman, the carrier's judgment of the factors of safety, undue work burden and adequate and safe transportation service to the public shall be controlling.

B.L.F. & E. Question #105 Answered September 16, 1964

B.L.F. & E. Question 105—May a carrier omit from their original list as served to local chairmen under Paragraph B-1, a road freight assignment operated regularly by time-table schedule and employing helpers-firemen called from the extra board, and then consider such job as blankable? (Central Vermont).

Answer—So long as the road freight operation involved in this dispute is considered to be extra service it is subject to the answer to B.L.F. & E. Question No. 9 of the Board's interpretations issued May 17, 1964.

B.L.F. & E. Question #135 Answered September 16, 1965

B.L.F. & E. Question No. 135—MAY THE ATCHINSON, TOPEKA & SANTA FE RAILWAY CORRECT AND/OR ADD TO LISTS OF NEWLY ESTABLISHED ASSIGNMENTS AS ISSUED AT THE END OF A 90-DAY PERIOD UNDER PARAGRAPH B(3), IN ORDER TO INCLUDE JOBS WHICH WERE ERRONEOUSLY OMITTED AND WOULD SUBSEQUENTLY REQUIRE THE EMPLOYMENT OF HELPERS-FIREMEN, BECAUSE OF THE CARRIER'S ERROR?

Answer—Consistent with the period of grace allowed to both parties in the original listing and vetoing of jobs, it is the intent of the Board to permit a reasonable opportunity for the correction of errors of omission in the preparation of revised lists under Section II, Part B(3) of the Award. If a carrier gives notice within seven (7) days of a listing date that it had erroneously omitted from the list of newly established assignment, such notice shall become effective only at the beginning of the next succeeding 90-day period. In the interim 90-day period, the assignment shall be regarded as a "must fill" job.

SUNA QUESTION No. III Answered June 9, 1964

III

Q. No. III—In the event the Carriers serve notice under caption III Consist of Road and Yard Crews (other than engine service) PART A—BASIC PROVISIONS A-3, or if procedures under PART B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:

QUESTION 1.—DO ALL PROCEDURES TERMINATE ON THE DATE THE BOARD TERMINATES?

QUESTION 2.—ARE ALL DECISIONS WHICH MAY BE RENDERED BY A NEUTRAL SUBSEQUENT TO THE DATE THE BOARD TERMINATES VOID?

Answer—These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exist following the termination of the Board's Award. The Board therefore lacks jurisdiction to answer them.

CARRIERS' QUESTION #5

Section II—Part B(1) and B(2) Answered May 17, 1964

Q. No. 5—The organization representatives have taken the position that the submission of lists pursuant to Section II, Part B(1), of the Award in so-called "full crew law states" is improper or illegal, and in certain of such instances they have refused to make designations under Part B(2) of assignments on which firemen shall be retained and in other instances they have designated all of the assignments listed by the carrier. It is the carriers' position that the carriers were required to submit lists under Part B(1) in order that there will be a classification of "blankable" and "non-blankable" jobs when and if such full crew laws are amended or repealed; that where the local chairmen have failed to make designations

pursuant to Part B(2), all of the jobs listed are "blankable", and where they have designated all of the jobs listed as requiring the retention of firemen, no more than 10 per cent of such jobs so designated will be accepted as requiring the retention of firemen, the others to be in the "blankable" category. Is the carriers' position correct?

Answer—The obligations and rights of the parties with respect to the listing of jobs and the exercise of the veto under Section II, Parts B(1), B(2), B(3) and B(4) of the Award are the same in the so-called "full crew law states" as in all other states. Local chairmen who have failed to make designations pursuant to Part B(2) in "full crew law states" may make such designations on or before June 3, 1964. Where the present designation by the local chairman designates all of the jobs listed as requiring the retention of firemen, he should modify such designations to conform to the 10 per cent limitation as interpreted by the Board in its answer to carrier's question No. 4 under Section II, Parts B(1) and B(2) on or before June 3, 1964.

APPENDIX H

Statutes Involved

Public Law 88-108, 77 Stat. 132:

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms

and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

SEC. 3. Promptly upon the completion of the naming of

the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parites, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

SEC. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

SEC. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, et seq.

* * * * *

FUNCTIONS OF MEDIATION BOARD

SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use it best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select

a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necesasry arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representatives as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses

and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided,* That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the

agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

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SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter

set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the results of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such

portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

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